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ORIGINAL

September 18, 2007

FILED/ACCEPTED

SEP 18 2007

Federal Communications Commission
Office of the Secretary

BY HAND DELIVERY

Marlene H. Dortch, Esq.

Secretary

Federal Communications Commission

445 12th Street, SW

Washington, DC 20554

Re: *Ex Parte* Notice, Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 1210-2360 MHz Frequency Band, IB Docket No. 95-91, GEN Docket No. 90-357, RM-8610; WCS License Renewal Applications of NW Spectrum Co. and WCS Wireless License Subsidiary, LLC, ULS Files Nos. 0003001466, 0003001467, 0003001468, 0003001469, 0003001470, 0003001471, 0003001472, 0003001473, 0003001474, 0003001475, 0003001476, 0003001477, 0003001478, 0003001479, 0003001448, 0003001449, 0003001450, 0003001451, 0003001452, 0003001453, 0003001454, 0003001455, 0003001456, 0003001457, 0003001458, 0003001459, 0003001460, 0003001461, 0003001462, and 0003001463

Dear Ms. Dortch:

I am writing on behalf of Green Flag Wireless, LLC, an applicant for certain WCS licenses, some of which are mutually exclusive with the applications of NW Spectrum Co. and WCS Wireless License Subsidiary, LLC (collectively, "NextWave"). NextWave's attorneys recently filed an *ex parte* notification indicating that its representatives had met with the Commission's staff (1) to urge adoption of technical rules that will permit coexistence of WCS spectrum with SDARS spectrum, and (2) to urge the grant of pending WCS renewal applications, including NextWave's.

Green Flag has no objection to the first presentation by NextWave since Green Flag also supports a practical technical solution to SDARS/WCS coexistence, and such a solution does not

Marlene H. Dortch, Esq.
September 17, 2007
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go the grant or denial of any particular application. However, we take strong exception to NextWave advocating the grant of *its own* applications which are mutually exclusive with ours. Such a presentation in the absence of Green Flag was plainly prohibited by Section 1.1208 of the Commission's rules. Once mutually exclusive applications are filed, the proceeding necessarily becomes a restricted one in which *ex parte* contacts going to the grant or denial of the competing applications are strictly forbidden. Here NextWave unquestionably knew that there were competing applications since it has been engaged in an exchange of pleadings with Snapline Communications, Inc., another applicant for the WCS channels presently licensed to NextWave. See attachment.

Green Flag is deeply troubled that discussions urging favorable action on NextWave's applications have occurred, to Green Flag's detriment, in violation of the rules. We are particularly concerned that NextWave has been advocating that the Commission take a position with respect to the availability of a renewal expectancy – one of the key issues to be decided in the comparative proceeding – without any opportunity for input from its competing applicants. Because they taint the very integrity of an agency's decision-making process, violations of the *ex parte* rules are viewed with extreme disfavor by the courts. See, for example, *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 18 R.R. 2109 (D.C. Cir. 1959): "Agency action that substantially and prejudicially violates the agency's rules cannot stand." *Jacksonville Broadcasting Corp v. FCC*, 348 F.2d 75 (D.C. Cir. 1965): "The public interest cannot be reconciled with leaving in effect grants which . . . were in significant part the result of extrajudicial representations and influences." Indeed, so gravely are *ex parte* violations viewed that the Commission's own rules provide that "a party who has violated or caused the violation of any provision of this subpart may be required to show cause why his or her claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected." 47 C.F.R. 1.1216.

We therefore request that NextWave be directed to provide the undersigned (and any other MX applicant) with a detailed account of its presentation on September 5, 2007 (or any other date) regarding its own applications or those of its competitors, including any documents given or shown to the staff on this or any other occasion. Green Flag further requests that it be advised of any other meetings scheduled with NextWave (or other WCS renewal applicants) regarding these applications so that it can have an opportunity to fairly present its views on the matters discussed. Finally, Green Flag urges the Commission to move toward a prompt

FLETCHER, HEALD & HILDRETH, P.L.C.

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resolution of the mutual exclusivity of these applications by commencement of an appropriate comparative proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Donald J. Evans", with a stylized flourish at the end.

Donald J. Evans
Counsel for Green Flag Wireless, LLC

DJE:deb

cc: Cathy Massey
Roger Noel
Kathy Harris
Fred Campbell
Jennifer L. Richter, Esq.
Stephen Roberts (Snapline Communications)

August 8, 2007

FILED/ACCEPTED

AUG - 8 2007

Federal Communications Commission
Office of the Secretary

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Grant of WCS License Renewal Applications
NW Spectrum Co. and WCS Wireless License Subsidiary, LLC
File Nos. 0003001466, 0003001467, 0003001468, 0003001469, 0003001470,
0003001471, 0003001472, 0003001473, 0003001474, 0003001475, 0003001476,
0003001477, 0003001478, 0003001479, 0003001448, 0003001449, 0003001450,
0003001451, 0003001452, 0003001453, 0003001454, 0003001455, 0003001456,
0003001457, 0003001458, 0003001459, 0003001460, 0003001461, 0003001462, and
0003001463

Dear, Ms. Dortch:

On July 27, 2007, Snapline Communications, LLC ("Snapline") filed a letter ("Snapline Letter") urging, in the alternative, that the Commission either grant its "competitive applications" for NextWave's WCS spectrum,¹ or hold a comparative hearing to evaluate NextWave's renewal applications against Snapline's filings.² In the instant letter NextWave briefly responds to several material misstatements in the Snapline Letter and reiterates its request that the Commission act quickly to grant NextWave's WCS license renewal applications.

First, and most importantly, Snapline has not filed any valid applications for NextWave's spectrum. The Commission dismissed the applications that Snapline initially filed for failure to follow proper procedures.³ Snapline did not, as the Commission's rules require, timely refile applications for

¹ Snapline Letter, July 27, 2007, page 1.

² *Id.*, page 2.

³ See, e.g., FCC Notice of Dismissal dated July 3, 2007, dismissing File No. 3061304, stating: "Your application is dismissed for failure to comply with section 1.913(d)(4) of the Commission's rules, which directs that [m]anually filed applications that do not require fees must be addressed and sent to Federal Communications Commission, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325-7245." The applications were defective in a number of respects beyond the specific reasons cited by the Commission in the denial letters.

NextWave's spectrum during the 30-day public notice period applicable to NextWave's renewal applications.⁴ In view of Snapline's failure to file valid or timely applications, Snapline is neither entitled to grant of its "competing applications," nor entitled to a comparative hearing. There are no Snapline applications to process.

Second, Snapline asserts that it filed for WCS licenses that "were" licensed to NextWave.⁵ This misstatement must be corrected. NextWave "is" the licensee of all 30 of its WCS licenses. The Commission's rules make clear that while renewal applications are pending, the licensee remains authorized for its spectrum.⁶ The spectrum that is licensed to NextWave is not vacant and is not available for application by Snapline.⁷

Third, Snapline argues that NextWave is not able to prove that it is entitled to a renewal expectancy for its WCS licenses because only "holders who have timely constructed their licenses would have an expectancy of renewal."⁸ This position is firmly at odds with the content of the Commission's *Waiver Order*.⁹ In that decision, the Commission concluded that it was in the public interest to grant WCS licensees an extension of the substantial service deadline to facilitate deployment of new technologies now in the final stages of development.¹⁰ Importantly, the Commission concluded that "the public interest would be ill-served by compelling WCS licensees to devote their resources to the

⁴ See 47 CFR § 1.934(a), (f). After the Commission dismisses an application "without prejudice" the Commission "may accept from the applicant another application for the same purpose at a later time, provided that the application is otherwise timely." Untimely applications must be dismissed. ("We will automatically dismiss any application that is defective because the applicant failed to sign the application, failed to pay the required filing fee, or filed outside the applicable filing window. These defects are fatal to the consideration of the application." Biennial Regulatory Review--Amendment of Parts 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, 13 FCC Rcd 21027, 21068 ¶ 90 (1998).

⁵ Snapline Letter, page 1.

⁶ 47 CFR § 1.62(a)(1). "Where there is pending before the Commission at the time of expiration of license any proper and timely application for renewal of license . . . such license shall continue in effect without further action by the Commission until such time as the Commission shall make a final determination with respect to the renewal application."

⁷ 47 CFR § 1.934(a). This rule provides that an application may be dismissed "if the requested spectrum is not available." NextWave has been granted an extension to satisfy the substantial service requirements for its WCS spectrum until July 21, 2010. Unless and until NextWave's licenses are revoked for failure to comply with Commission rules, or NextWave fails to meet its substantial service requirements and, therefore, no longer holds its WCS licenses, the spectrum is not available.

⁸ Snapline Letter, page 1.

⁹ Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses, *Order*, 21 FCC Rcd 14134 (2006) ("Waiver Order").

¹⁰ *Id.* at 14140-41, ¶¶ 11-13.

construction of stop-gap, legacy systems merely to meet the July 21, 2007 construction deadline rather than consumer demand."¹¹ As a result of this action, the deadline for NextWave to demonstrate substantial service utilizing its WCS spectrum is July 21, 2010; NextWave has not failed to meet any required construction deadline. It would violate every notion of fairness and due process for the Commission to grant WCS licensees, such as NextWave, an extension of the construction / substantial service deadline with one hand, and then take the licenses away with the other hand for failure to meet a supplanted and no-longer-applicable construction deadline.¹²

In short, if WCS licensees' renewal expectancy is to be based upon meeting the substantial service standard, which the Commission already has determined is not reasonably achievable at this time, then that assessment must be made *after* the licensees have made their substantial service showings in accordance with the FCC's rules.¹³ Given that Snapline concedes that "WCS license holders who have timely constructed their licenses would have an expectancy of renewal,"¹⁴ it must also concede that its claims regarding NextWave's renewal expectancy are frivolous, since NextWave still has three years to timely construct its 2.3 GHz WCS licenses. Ultimately, however, there is no reason to delay renewal of the WCS licenses on grounds that licensees have not yet met their substantial service obligations because the simple fact is that these licenses will automatically terminate in the event such obligations are not met by the applicable deadline of July 21, 2010 (affording all other parties an opportunity to apply for such cancelled licenses).¹⁵

Furthermore, NextWave has held the authorizations for the WCS licenses for merely 2 years. During that time, it has complied with all FCC rules and regulations regarding the licenses, is in

¹¹ *Id.* at 14141, ¶ 12.

¹² The Commission must note that there are no procedures for filing competing applications for WCS spectrum. If there were such rules, and if the rules followed the Part 22 rules regarding comparative hearings, then NextWave would not be obligated to file its renewal expectancy showing until 60 days after an FCC Public Notice announcing that the renewal application and competing applications were accepted for filing. 47 C.F.R. § 22.935(a).

¹³ Snapline asserts that the Commission declined to condition the renewal extension "presumably ... [to] ensure that WCS licensees were working diligently to bring service to the public ..." Snapline Letter, page 3. There is no question that the Commission hopes to see deployment of advanced services in the 2.3 GHz band, using technologies that are only just now being finalized for incorporation into equipment that should become commercially available in the near future. Indeed, the Commission expressly rejected the notion of deploying legacy systems. However, as the Commission itself explained, the reason it declined to condition the renewal extension was simply because there were no renewal applications pending before it at the time it granted the extension – nor, as the Commission further explained, could there be, since that date was more than 90 days prior to the expiration date of the subject licenses. See *Waiver Order* at 14141, ¶ 15 (citing 47 C.F.R. § 1.949(a)). As the Commission concluded, "a ruling on prospective renewal requests would be premature." *Id.* In any event, there would be no purpose in adopting such a condition because, as the Commission observed in the *Waiver Order*, licenses that are not constructed in accordance with the substantial service requirements by the applicable deadline – which, as a result of the *Waiver Order*, is July 21, 2010 for NextWave's 2.3 GHz licenses – automatically terminate by operation of the FCC's rules. See 47 C.F.R. §§ 1.946(c), 1.955(a)(2) and 27.14(a).

¹⁴ Snapline Letter, page 1.

¹⁵ See 47 C.F.R. §§ 1.946(c), 1.955(a)(2) and 27.14(a).

good standing as a licensee, and was granted an extension until July 21, 2010 to demonstrate substantial service using its WCS licenses. Contrary to Snapline's assertions, NextWave has not held the licenses for years "biding" its time waiting for prices to rise. In the short period of time NextWave has owned the licenses, it has worked diligently as part of the WCS Coalition to address the void in final technical rules for WCS and SDARS that necessitated extension of the substantial service deadline contained in the *Waiver Order*. NextWave also has devoted substantial resources, and is employing hundreds of engineers to develop semiconductors, chipsets and technology that will make it possible to use WCS spectrum for advanced WiMAX services, as the Commission envisioned in *Waiver Order*, after the Commission adopts final technical rules for the spectrum. NextWave has been working toward and will be trialing "pre-WiMAX" solutions over its WCS spectrum in Las Vegas, Nevada in the third and fourth quarter of 2007. NextWave is not "biding" its time, but rather is eagerly pursuing all avenues to make use of the spectrum in which it has invested heavily.

Fourth, Snapline's "informal objections," which remain associated in ULS with NextWave's renewal applications, should be purged from the system. Snapline admits that it never intended to file informal objections. It states, simply, that it did not have any other filing option for uploading its defective applications into ULS.¹⁶ Given that Snapline never intended to file informal objections, and in view of the fact that its "informal objections" are actually applications that were dismissed by the Commission on July 3, 2007, there is no valid reason for ULS to continue to contain the "informal objections." NextWave respectfully requests that the staff address this matter without delay.

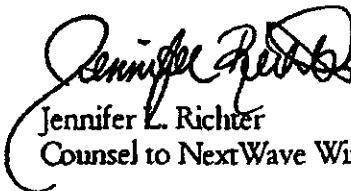
Finally, it is telling that Snapline does not dispute that it has a history of targeting NextWave with filings at the Commission, and it admits that it has not filed "competing applications" against any WCS licensee but NextWave. Snapline also never disputes that the purpose of its filings against NextWave are to delay and obstruct NextWave's business. Contrary to Snapline's assertions, its applications do *not* "raise real issues that the Commission must decide as to expectancy of renewal."¹⁷ All issues relevant to completion of construction requirements, which Snapline alleges is essential to the question of renewal expectancy and is the crux of Snapline's filings, were addressed by the Commission in the *Waiver Order*. In view of all the foregoing, Snapline's filings are unquestionably strike pleadings or strike applications, and this matter should be taken up by the Commission's Enforcement Bureau.

¹⁶ Snapline Letter, page 1, "the Snapline filings are applications that compete with NextWave's renewal applications and not mere informal objections." See Snapline Letter, page 2, Snapline merely chose the "moniker" of "informal objection" because ULS does not have a designation for competing applications. No informal objections were filed against NextWave's renewal applications and thus no informal objections should be associated with NextWave's renewal applications.

¹⁷ Snapline Letter, page 4.

For all of the foregoing reasons, and for all the reasons set forth in NextWave's letter of July 18, 2007 (attached hereto as Exhibit A), the Commission should dispose of all Snapline filings related to NextWave's WCS spectrum. *NextWave's renewal applications should be granted without delay so that important WCS work can continue and the Commission's build-out expectations for NextWave can be realized.*

Respectfully submitted,



Jennifer L. Richter
Counsel to NextWave Wireless Inc.

Exhibit A

**NextWave's July 18, 2007 Letter
Regarding the Snapline Filings
(*Exhibits Excluded*)**

FILED/ACCEPTED

July 18, 2007

JUL 18 2007

Federal Communications Commission
Office of the Secretary

Jennifer Richner
202-457-5666
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Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Grant of WCS License Renewal Applications
NW Spectrum Co. and WCS Wireless License Subsidiary, LLC
File Nos. 0003001466, 0003001467, 0003001468, 0003001469, 0003001470, 0003001471,
0003001472, 0003001473, 0003001474, 0003001475, 0003001476, 0003001477,
0003001478, 0003001479, 0003001448, 0003001449, 0003001450, 0003001451,
0003001452, 0003001453, 0003001454, 0003001455, 0003001456, 0003001457,
0003001458, 0003001459, 0003001460, 0003001461, 0003001462, and 0003001463

Dear Ms. Dortch:

NW Spectrum Co. ("NW") and WCS Wireless License Subsidiary, LLC ("WCSW"), each WCS licensees and wholly-owned indirect subsidiaries of NextWave Wireless Inc. (collectively referred to herein as "NextWave"), by their counsel, hereby request expeditious grant of the above-referenced WCS license renewal applications ("Renewal Applications").

The Renewal Applications were filed on April 23, 2007, and were accepted for filing on May 2, 2007. No petitions to deny were filed against any of the Renewal Applications during the thirty (30) day public notice period, which expired on June 1, 2007. The Communications Act of 1934, as amended ("the Act"), directs the Commission to grant an application if there are no substantial and material questions of fact and if grant of the application would be consistent with the public interest.¹ The NextWave Renewal Applications satisfy both of these requirements.

The Commission recently determined in a *Waiver Order* that it is in the public interest to grant NextWave, as well as all other WCS licensees, a three-year extension of time, to July 21, 2010,

¹ "If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) . . . , it *shall* make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition." 47 U.S.C. §309(d)(2) (emphasis added).

to construct WCS stations and demonstrate substantial service.² Given the content of the *Waiver Order*, and given the Commission's build-out expectations for NextWave and all WCS licensees for 2010, there should be no question that it also is in the public interest to grant the Renewal Applications so that important WCS development work can continue and substantial service can be demonstrated by 2010. WCS licensees, including NextWave, whose licenses are in full force and effect, who are in good standing with the Commission, who timely filed their license renewal applications, and who have been granted an extension of time to satisfy substantial service pursuant to the *Waiver Order*, have every legitimate expectation of license renewal and should not be subject to competing applications at this critical juncture. Moreover, as to NextWave's Renewal Applications in particular, and as described in more detail below, no party raised any substantial and material questions of fact about the Renewal Applications, including Snapline Communications, LLC, which could justify delaying or denying grant.

Snapline's First Attempt to File Competing Applications.

As Commission staff is aware, Snapline Communications, LLC ("Snapline") apparently filed 30 "competing applications" against the NextWave Renewal Applications on May 31, 2007 and June 1, 2007.³ The applications seek use of WCS spectrum that is exclusively licensed to NextWave and for which NextWave has until July 21, 2010 to prove substantial service. Snapline did not file petitions to deny against the Renewal Applications during the 30-day notice period. Instead, it filed "competing applications" which also were uploaded into the FCC's Universal Licensing System ("ULS") as "informal objections" to the Renewal Applications.

Snapline's first set of competing applications were filed at the end of the 30-day public notice period for the Renewal Applications which closed on June 1, 2007.⁴ The Commission formally dismissed the Snapline applications as defective and out of compliance with FCC rules.⁵ Although it is moot now, the Snapline competing applications were defective in a number of respects beyond the reasons cited by the Commission, including Snapline's failure to serve NextWave, the current licensee, with copies of either the "competing applications" or the "informal objections."⁶ A chart aligning NextWave's WCS licenses, NextWave's Renewal

² *Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses, Order*, 21 FCC Rcd 14134 (2006) (hereinafter, "*Waiver Order*").

³ NextWave has never seen date-stamped copies of the applications. The precise filing date is unclear.

⁴ *Public Notice*, Report No. 3119 (May 2, 2007).

⁵ See, e.g., FCC Notice of Dismissal dated July 3, 2007, dismissing File No. 3061304, stating: "Your application is dismissed for failure to comply with section 1.913(d)(4) of the Commission's rules, which directs that [m]anually filed applications that do not require fees must be addressed and sent to Federal Communications Commission, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325-7245."

⁶ Snapline sent NextWave a letter referencing competing applications that were filed, but did not provide service of the applications to NextWave. Snapline also did not provide NextWave with service of the "informal objections." The Act and the Commission's rules require a party making filings against an application to serve the applicant with

Applications and Snapline's competing applications is attached hereto as Exhibit 1. Copies of the Commission letters dismissing the Snapline competing applications are attached hereto as Exhibit 2.

Snapline's Second Attempt to File Competing Applications.⁷

In view of Snapline's prior filings against the NextWave Renewal Applications, and given Snapline's failure to serve NextWave, NextWave diligently checks ULS each day for Snapline-related filings against NextWave. On or about July 11, 2007, NextWave noted that new Snapline competing applications with a date-stamp of July 5, 2007 appeared in ULS. NextWave printed all Snapline applications it could find as of that date, but the applications no longer reside in ULS and their fate is unclear.

Given that the 30-day public notice period for NextWave's Renewal Applications closed on June 1, 2007, if the Commission has not already dismissed the second group of Snapline competing applications as untimely filed, then it should do so immediately.⁸ Snapline's applications also should be dismissed because they are, once again, defective, incomplete and inaccurate,⁹ and Snapline failed to serve NextWave, the current license holder, with copies of the

copies of those filings. Snapline did not serve a copy of its filings on NextWave or its counsel nor did it request a waiver of the Commission's service rules. 47 U.S.C. 309§(d)(1) ("The petitioner shall serve a copy of such petition on the applicant.") and 47 C.F.R. §1.939(c) ("A petitioner shall serve a copy of its petition to deny on the applicant and on all other interested parties pursuant to §1.47."). Section 1.47 also requires service of counsel. NextWave's counsel was not served with any of the Snapline filings. 47 C.F.R. §1.47.

⁷ The second group of Snapline competing applications, at least the applications NextWave could locate and print, do not appear to contain competing applications for NextWave's B-Block WCS licenses in Boston (K1LNB200) and Milwaukee (K1NLB206).

⁸ Section 1.934 of the Commission's rules provides that after the Commission dismisses an application "without prejudice" the Commission "may accept from the applicant another application for the same purpose at a later time, provided that the application is otherwise timely." 47 C.F.R. §1.934(a). In this case, Snapline's second attempt at filing competing applications for NextWave's WCS spectrum was untimely and the applications must be dismissed. 47 C.F.R. §1.934(f)

⁹ Section 1.923 of the Commission's rules requires applicants to include in their application "all information requested on the applicable form and any additional information required by the rules in this chapter and any rules pertaining to the specific service for which the application is filed." 47 C.F.R. §1.923. Snapline's second set of applications for NextWave's WCS spectrum should be dismissed for failure to comply with this rule. Section 1.934 of the rules provides that the Commission may dismiss applications that are "found to be defective." 47 C.F.R. §1.934. Snapline's applications are both incomplete and inaccurate. Snapline answered affirmatively that its applications involve frequencies or parameters that are grandfathered, approved by waiver, or integrated with an existing station, but omit any further details, rendering the applications incomplete. The purpose of this question is to alert the Commission that the application "may include technical data which is outside the limits of the existing rules" which has been grandfathered or approved through a waiver. The waiver request also fails to explain why "the facts surrounding the subject application is [sic] unique and unusual." More than a statement that the factual circumstances of a situation are unique and unusual is required under the Commission's rules in order for a request for waiver to be granted. 47 C.F.R. §1.925(b)(2) ("Requests for waiver must contain a complete explanation as to why the waiver is desired."); *WAT Radio v. F.C.C.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("[A]n applicant for a

"competing applications."¹⁰ Finally, Snapline's applications should be dismissed because the spectrum it seeks is exclusively licensed to NextWave, who has complied with all Commission rules with respect to its spectrum, and has until July 21, 2010 to make its substantial service demonstration for its WCS spectrum.¹¹

Snapline's Informal Objections.¹²

As noted earlier, the first round of Snapline competing applications were properly dismissed by the Commission effective July 2, 2007. However, these same filings continue to appear in ULS as "informal objections" to NextWave's Renewal Applications. In view of their formal dismissal by the Commission, these filings can no longer be considered "competing applications." The filings also should be dismissed as "informal objections" to the Renewal Applications because they do not meet the requirements of informal objections as set forth in Section 1.41 of the Commission's rules.¹³ Even assuming, *arguendo*, that the Commission could consider the dismissed applications as informal objections, such filings should be dismissed and the NextWave Renewal Applications should be granted because the Snapline filings do not raise substantial or material questions of fact that the Commission must consider with respect to the Renewal Applications.¹⁴

waiver faces a high hurdle even at the starting gate. "When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such an action."). Snapline's applications do not comply with the application requirements of Section 1.923 and 1.925(b) of the Commission's rules and should be dismissed immediately.

¹⁰ Section 309(d)(1) of the Act directs a petitioner to serve copies of filings opposing an application on the applicant. Snapline did not serve a copy of its filings on NextWave or its counsel nor did it request a waiver of the Commission's service rule. 47 U.S.C. 309(d)(1) ("The petitioner shall serve a copy of such petition on the applicant.") and 47 C.F.R. §1.939(c) ("A petitioner shall serve a copy of its petition to deny on the applicant and on all other interested parties pursuant to §1.47.").

¹¹ Section 1.934 of the Commission's rules provides that an application may be dismissed "if the requested spectrum is not available." 47 C.F.R. §1.934. NextWave has been granted an extension to satisfy the substantial service requirements for its WCS spectrum until July 21, 2010. Unless and until NextWave's licenses are revoked for failure to comply with Commission rules, or NextWave fails to meet its substantial service requirements and, therefore, no longer holds its WCS licenses, the spectrum is not available.

¹² Please note that Snapline did not file an informal objection against NextWave's Renewal Application for KNLB220, the WCS license for Los Angeles-San Diego.

¹³ Section 1.41 of the Commission's rules provides that an informal request for Commission action should "set forth clearly and concisely the facts relied upon, the relief sought, the statutory and/or regulatory provisions (if any) pursuant to which the request is filed and under which relief is sought, and the interest of the person submitting the request." 47 C.F.R. § 1.934. The Snapline filings fail to meet these requirements.

¹⁴ See *supra* note 1.

The sole issue regarding NextWave's WCS spectrum that is raised in Snapline's applications/informal objections is the lack of operational service. Snapline states the following in its "Public Interest Consideration" exhibit:

The subject spectrum has lain fallow for nearly the entire duration of the license term. The only action that the current licensee has taken has been to request an extension of time in which to construct.

The public deserves to have the subject spectrum put to use. If the subject application is granted, Snapline is prepared to do so in the near term.¹⁵

This allegation applies to all 2.3 GHz WCS spectrum the Commission has licensed. The valid reasons that construction has not commenced in the band were addressed by the Commission in the *Waiver Order*.¹⁶ As the Commission is well aware, NextWave and all other WCS licensees were not required to make a substantial service showing in connection with their renewal applications. In the *Waiver Order*, the Commission found that it serves the public interest to grant all WCS licensees an additional three years to construct WCS systems and provide substantial service.¹⁷ As acknowledged by the Commission in the *Waiver Order*, WCS licensees demonstrated that they face factors beyond their control which have limited their options in providing service, but that new technology solutions may be available in the near future.¹⁸ Accordingly, Snapline's "informal objection" does not raise any allegations that have not been considered in the public record and that the Commission must now resolve. The Act directs the Commission to grant an application if there are no substantial and material questions of fact.¹⁹ Given that no substantial or material questions of fact have been raised by Snapline or anyone else with respect to the Renewal Applications, the Commission should grant the Renewal Applications without delay.

Snapline's Filings Are Strike Pleadings.

The Snapline filings also should be dismissed because, even taken at their best, the Commission must conclude that they are strike pleadings against NextWave. The Commission prohibits pleadings that are filed for the purpose of causing delay.²⁰ In reviewing strike pleadings,

¹⁵ See, "Public Interest Consideration," Snapline's filings in the ULS records for the Renewal Applications.

¹⁶ See, *supra* note 2.

¹⁷ *Waiver Order*, ¶13.

¹⁸ *Id.*, ¶9.

¹⁹ "If the Commission finds . . . that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section . . . , it *shall* make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition." 47 U.S.C. §309(d)(2) (emphasis added).

²⁰ 47 C.F.R. §1.52 ("The signature or electronic reproduction thereof by an attorney constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief there is good ground to

the Commission considers whether a petitioner has filed the pleading for the primary and substantial purpose of delay,²¹ and considers many factors including the "conduct of the petitioner."²² To NextWave's knowledge, Snapline has not filed "competing applications" or "informal objections" against any WCS licensee, except NextWave. In addition, the principal of Snapline, Stephen Roberts, has a history of making filings against NextWave. Mr. Roberts was the Managing Director of NY Telecom, LLC which previously filed a petition to deny assignment applications filed by a former NextWave company.²³ In fact, NY Telecom was a party to numerous other proceedings involving opposition to NextWave applications.²⁴ NY Telecom also was a party to a Notice of Appeal and a Petition for Review of a Commission's Order granting assignment of license applications from a former NextWave company to Cingular.²⁵ The petition to deny was later withdrawn as part of a settlement agreement²⁶ and the D.C. Circuit cases dismissed.²⁷ Mr. Roberts' history of filings against NextWave, coupled with the fact that

support it; and that it is not interposed for delay. If the original of a document is not signed or is signed with intent to defeat the purpose of this section, or an electronic reproduction does not contain a facsimile signature, it may be stricken as a sham and false, and the matter may proceed as though the document had never been filed." (emphasis added).

²¹ *Commission Taking Tough Measures Against Frivolous Pleadings*, Public Notice, 11 FCC Rcd 3030 (1996) (stating a pleading may be deemed frivolous if there are no good grounds to support it or if it was filed to cause delay).

²² *Applications of High Plains Wireless, L.P., Memorandum Opinion and Order*, 12 FCC Rcd 19627, ¶ 6 (1997); *Implementation of Cable Television Consumer Protection Act*, 9 FCC Rcd 2642, 2657 (1993) (stating a frivolous complaint is one that is filed without researching or reviewing the underlying facts or is based on arguments that have been raised and rejected by the Commission). The other factors the Commission considers are: "(1) statements by the petitioner's principals or officers admitting the obstructive purpose; (2) the withholding of information relevant to disposition of the requested issues; (3) the absence of any reasonable basis for the adverse allegations in the petition; and (4) economic motivation indicating a delaying purpose." *Id.*

²³ See Petition to Deny ("Petition") filed by Eldorado Communications, LLC and NY Telecom, LLC on November 5, 2003, in Cingular Wireless and NextWave Seek FCC Consent for the Full and Partial Assignment of Thirty-Four Broadband Personal Communications Services Licenses, WT Docket No. 03-217. Exhibit 1 to the Petition indicates Stephen Roberts was the Managing Director of NY Telecom, LLC when the Petition was filed. Since Eldorado does not appear in the FCC's Universal Licensing System ("ULS") as a Commission licensee, NextWave has not been able to confirm if Mr. Roberts has an interest in that entity as well.

²⁴ NY Telecom Application for Review, File Nos. 000855872, *et al.*, NY Telecom Request for Public Proceeding Regarding NextWave's Construction Obligations and Revocation of Licenses that are not Timely Constructed, File Nos. 000855872, *et al.*, NY Telecom Reply to NextWave, File No. 000855872, *et al.* Since NY Telecom listed these filings as representative matters in which they participated, they may have filed other petitions against NextWave as well.

²⁵ The cases were filed in the U.S. Court of Appeals for the D.C. Circuit and were assigned Case Nos. 04-1067 and 04-1068.

²⁶ See *Wireless Telecommunications Bureau Mobility Division Approves Withdrawal of Petition to Deny and Related Settlement Agreement*, FCC Public Notice, 19 FCC Rcd 5240 (2004).

²⁷ *El Dorado Communications, LLC v. FCC*, 2004 WL 612768 (March 26, 2004).

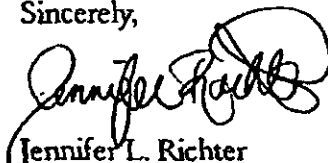
Snapline only filed competing applications against NextWave's WCS license renewal applications, is a clear indication that Snapline's primary purpose for filing is to delay or obstruct NextWave's business. *In the context of the previous settlement, NY Telecom obtained reimbursement for costs.* The motivation here may be financial as well. The Commission should consider Mr. Roberts' prior and current conduct, and his numerous, repetitive filings that single out NextWave, and conclude that the primary purpose for Snapline's filings is to delay or obstruct NextWave. Snapline's strike pleadings should be dismissed.

Conclusion.

In conclusion, NextWave respectfully requests that the Commission expeditiously attend to this matter, dismiss Snapline's "informal objections" and any other Snapline "applications" that may be pending, and grant NextWave's Renewal Applications for the following reasons: (1) Snapline's first set of competing applications filed against the Renewal Applications were properly dismissed; (2) Snapline's second set of competing applications, to the extent they are still pending, should be dismissed as untimely filed, as defective and incomplete, and for failure of proper service on NextWave; (3) Snapline's "informal objections" were not served on NextWave, do not satisfy the Commission's requirements for informal objections, and are nothing more than electronic copies of competing applications that were properly dismissed. Even taken as informal objections, the filings raise no substantial and material questions of fact that the Commission has not already addressed for all WCS licensees in the *Waiver Order*; and (4) Snapline's filings are nothing more than strike pleadings filed for the sole purpose of delaying or obstructing NextWave's business, a motivation that is clear from the prior and current conduct of Snapline's principal who has, in this case and in the past, singled out NextWave with obstructive filings.

WCS licensees, including NextWave, whose licenses are in full force and effect, who are in good standing with the Commission, who timely filed their license renewal applications, and who have been granted an extension of time to satisfy substantial service pursuant to the *Waiver Order*, have every legitimate expectation of license renewal at this time. Under all these circumstances, the Commission should expeditiously dispose of the Snapline filings and grant the Renewal Applications.

Sincerely,



Jennifer L. Richter
Counsel to NextWave Wireless Inc.

cc: Jennifer McCarthy

CERTIFICATE OF SERVICE

I, Peter Andros, certify on this 8th day of August, 2007, a copy of the foregoing has been served via electronic mail or first class mail, postage pre-paid, to the following:

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